

(2026) 01 OHC CK 1749
In the Orissa High Court
Case No : RFA No.160 Of 2007

Gouranga Chandra Mohanty And Others APPELLANT
Vs
Saraswati Mohapatra (Since Dead) Through L.Rs. RESPONDENT

Date of Decision : 07-01-2026

Acts Referred:

Code Of Civil Procedure, 1908 — Section 47
Indian Succession Act, 1925 — Section 2(h), 57, 213(1), 213(2), 264
Transfer of Property Act, 1882 — Section 122, 123
Registration Act, 1908 — Section 17, 17(1)(b), 17(1)(c)
Evidence Act, 1872 — Section 101, 110
Bharatiya Sakshya Adhiniyam, 2023 — Section 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114
Indian Contract Act, 1872 — Section 16

Citation : (2026) 01 OHC CK 1749

Hon'ble Judges : B.P. Routray, J

Bench : Single Bench

Advocate : P.K.Rath S.Das, S.Mantri

Final Decision : Allowed

Judgement

B.P. Routray, J

1. Present appeal is directed assailing order 12th April 2007 passed in T.S.No.2/6 of 2007-97 by the learned Ad-hoc Addl. District Judge (Fast Track), Champua.

2. The suit was filed by Respondent No.1. Present Appellant No.1 was Defendant No.1 and Appellants No.2 to 6 were Defendants No.2 to 6 before the learned trial court. One Pranaballav Das was the original owner of the suit properties, which was recorded in his name. Plaintiff is the daughter of said Pranaballav Das and Defendant No.1 is the son of sister of Pranaballav Das. The Plaintiff filed the suit praying for declaration of right title interest, permanent injunction or in alternative recovery of possession. Her prayer in the suit reads as under;

"The plaintiff, therefore, prays:-

a) The right, title, interest of the plaintiff over the estate of Pranaballav Das be declared after declaring the Gift Deed No.162 dt.23.2.94 and two Wills dt.18.12.76 and 16.5.91 to be null and void and inoperative against the interest of the plaintiff;

b) the defendants be permanently injuncted not to interfere with the possession of the plaintiff over the estate of her father, Pranaballav Das in alternative if plaintiff is found to be dispossessed in the mean time, recovery of possession of the suit land;

c) cost of the suit be decreed in favour of the plaintiff;

d) any other relief or reliefs to which the plaintiff is entitled under law and equity be given."

The schedule of suit properties is as follows:-

"Schedule of land mentioned in Gift Deed:

Mouza-Kaliprasad, P.S.Champua, Dist-Keonjhar.

Khata No.320/103.

Plot No.

Area.

Kissam

1647

A.0.24 decs.

Sarad-II

1657

A.3.40 "

- do -

605

A.0.79 "

Sarad-II

1659

A.0.71 "

Sarad-III

1536

A.0.33 "

Bajefasal

1396

A.0.04 "

Gharabari

1397

A.0.39 "

Bajefasa

Total

A.5.90 decimals.

Suit land in T.S.No.1/85.

Plot No.1396 A.0.02 decimals.

Plot No.1395 A.0.05 ½ decimals

Total:- A.0.07 ½ decimals."

3. The Plaintiff's case is that the suit land was decreed in favour of her father, late Pranaballav Das, in T.S.No.14/46 and has been recorded in his name. After her marriage, taking advantage of mental imbalance of her father, some unscrupulous and mischievous persons wanted to grab his entire properties and taking advantage of dissention between her with Pranaballav Das, Defendant No.1 coming to their house influenced Pranaballav Das to get an Adoption Deed and WILL dated 8th December 1976 from Pranaballav Das in his favour. Then, Defendant No.1 successfully instigated Pranaballav to institute a suit bearing no.T.S.No.1/85 against the plaintiff and her husband to oust her from possession of Plot No.1396 and Plot No.1395. The said suit having been decreed in favour of Pranaballav Das as Plaintiff No.1, he initiated Execution Case No.3/93. It needs to be mentioned here that in said Title Suit, i.e. T.S.No.1/85, present Defendant No.1 (Gouranga Ch. Mohanty) was Plaintiff No.2 and his claim therein as adopted son of Pranaballav Das has been negated by the learned trial court. So, it is now settled that Defendant No.1 is not the legally adopted son of Pranaballav Das, whereas the Plaintiff is the only daughter of Pranaballav Das. However, the Plaintiff filed a petition under Section 47 of the Code of Civil Procedure vide MJC No.3/94, in Execution Case No.3/93 resisting the execution of the decree passed in T.S.No.1/85 and during pendency of Execution Case No.3/93, Pranaballav Das expired on 25th January 1997. After death of Pranaballav Das, when Defendant No.1 applied for continuance of the execution proceeding as the legal representative of the decree holder, the same was rejected and the execution case was dismissed. The said dismissal of the execution case has been confirmed upon dismissal of Misc. Appeal No.10/95 preferred by Defendant No.1.

4. In the above background facts of the case, it is found that two WILLS dated 8th December 1976 (Ext.9) and 16th May 1991 (Ext.10) and a Gift Deed dated 23rd February 1994 (Ext.4) were executed illegally by Pranaballav Das in favour of Defendant No.1. Taking advantage of such illegal and void WILLS as well as the Gift Deed, Defendant No.1 sold certain part of the suit properties in favour of Defendants no.2 to 6 vide Registered Sale Deeds No.108/96 (Ext.D-2), 358/96 (E-2) and 616/96 (F-2). The properties covered under Exts.D-2, E-2 and F-2 are now been mutated in respect of Defendants No.2 to 6 respectively. The ROR in that regard is Ext.G-2. In such circumstances, the Plaintiff filed the suit praying the afore-stated reliefs.

5. The Defendants contested the suit. Defendant No.1 filed his written statement and Defendants No.2 to 6 filed their written statement separately. According to Defendant No.1, the Plaintiff, who is the daughter of Pranaballav Das, eloped on 28th February 1974 with one Manmohan Mohapatra without his knowledge leaving her old father Pranaballav Das alone. Since the wife of Pranaballav Das died very early when the Plaintiff was a small child, Pranaballav Das without getting any support to sustain his life adopted Defendant No.1, who is his sister's son, by executing a Registered Adoption Deed dated 17th May 1974. Since then, Defendant No.1 is residing with Pranaballav Das staying in his house as the adopted son and finally performed all obsequies and death ceremonies as the son of Pranaballav Das upon his death. However, one fine morning after fifteen years, the Plaintiff along with her husband suddenly arrived in the house of Pranaballav Das begging him to allow her to stay there in one room, since her husband has been transferred to a distance place, i.e. from Joda to Sundargarh as Supply Inspector. Out of sympathy, Pranaballav allowed her to live in one of the rooms situated over Plot No.1396 temporarily. But some days thereafter, the Plaintiff started ill treating her father (Pranaballav Das) and did not vacate the room despite several requests made by Pranaballav Das. So Pranaballav Das filed T.S.No.1/85 against her where present Defendant No.1 joined as Plaintiff No.2, and the suit was finally decreed in favour of Pranaballav Das. During the old age of Pranaballav Das starting from the day of adoption of Defendant No.1, Defendant No.1 was taking care of Pranaballav Das always as his father and even after death of Pranaballav Das, Defendant No.1 performed all obsequies and death ceremony of Pranaballav Das. In the meantime, Pranaballav Das executed a WILL first on 8th December 1976 and then on 16th May 1991 in favour of Defendant No.1. Pranaballav Das was completely dissatisfied and discontented with the behavior on the part of the Plaintiff towards him. Having been satisfied and pleased with Defendant No.1 and his service towards him, Pranaballav Das executed a Registered Gift Deed on 23rd February 1994 in respect of the suit land in favour of Defendant No.1. Thus, what is contended by the Plaintiff to grab the properties of Pranaballav Das as his daughter, who never discharged her duties as the daughter and was unkind, insensitive towards Pranaballav Das, to raise such dispute after his death is ill-motivated. Defendant No.1 was continuing with possession of the suit land/properties prior to and on the date of death of

Pranaballav Das and has also executed Registered Sale Deeds in favour of Defendants No.2 to 6.

6. The learned trial court framed fourteen issues, which are described below, in order to adjudicate the dispute and said issues are as follows:

“ISSUES

- (1) Whether the suit is maintainable ?
- (2) Whether the suit is barred by law of limitation ?
- (3) Whether the suit is bad under law of estoppel and acquiescence ?
- (4) Whether the plaintiff has cause of action to bring the suit ?
- (5) Whether the suit is bad for non-specification of the suit land ?
- (6) Is the suit bad for non-joinder of necessary parties?
- (7) Is the suit barred by resjudicata ?
- (8) Is the suit grossly undervalued ?
- (9) Whether the plaintiff has right, title, interest and possession over the suit land ?
- (10) Whether the plaintiff is entitled for permanent injunction as prayed for ?
- (11) Whether the plaintiff is sole successor-in-interest of late Pranaballav Das ?
- (12) Whether the gift deed No.162 dt.23.2.94 and the Wills dtd.8.12.76 and 16.5.91 executed by Pranaballav Das in favour of D-1 are void ?
- (13) Whether the registered sale deed No.108/96, 358/96 and 616/96 executed by defendant no.1 in favour of defendant Nos.2 to 6 are void and inoperative ?
- (14) To what other relief/reliefs the plaintiff is entitled.”

7. All such issues have been answered in favour of the Plaintiff to render the judgment allowing the suit against the Defendants. Upon adjudication, learned trial court has ordered as follows:

“The suit be and the same is decreed in part on contest against the defendants. The registered gift deed bearing no.162 dt.23.2.94 is hereby declared as illegal and invalid and the sale deeds vide Exts.D-2, E-2 and F-2 executed by the defendant no.1 in favour of defendant nos.2 to 6 basing upon the above illegal gift deed are hereby declared as void and inoperative deeds. The right, title, interest and possession of the plaintiff over the entire suit properties except her possession over the properties covered under Exts.D-2, E-2 and F-2 is declared. The defendant no.1 is permanently enjoined from interfering with the possession of the plaintiff over the suit proprieties.

The defendant nos.2 to 6 are directed to deliver the possession of the suit

properties covered under sale deeds vide Exts.D-2, E-2 and F-2 to the plaintiff within four months hence, failing which the plaintiff is at liberty to make recovery of possession of the same from defendant nos.2 to 6 through the process of the court as per law.

In the circumstances, the parties are directed to bear their respective costs.”

8. The Appellant challenges the findings of the learned trial court mainly on two grounds, first, the suit is barred by limitation and second, the appreciation of the trial court with regard to WILLS and Gift Deed is contrary to the settled principles of evidence.

9. It is submitted on behalf of the Appellants (Defendants) that, Probation of the WILL in respect of properties situated at Champua in the district of Keonjhar is exempted and not required in terms of Section 57 of the Indian Succession Act as has been well settled by several decisions of this Court. Therefore, the finding of learned trial court regarding invalidity of the WILL in absence of Probate thereof is unsustainable. Secondly, the finding of the learned trial court with regard to acceptance of the gifted properties and the consequent ineffectiveness of the Gift Deed is contrary to the settled principles of evidence. The learned trial court by rejecting the valid execution of the Gift Deed has not only foreclosed its eyes about the rights of Defendant No.1, but also questioned the rights of Defendants no.2 to 6 regarding their interest over the respective properties accrued by way of Registered Sale Deeds.

10. On the other hand, it is submitted by the L.Rs of the Plaintiff, who are substituted upon death of the sole Plaintiff during pendency of the appeal as Respondents No.1(a) to 1(d), that, after execution of the alleged WILL dated 16.05.1991, a portion of the property covered in that WILL was gifted in favour of Defendant No.1 vide the alleged gift deed dated 23.02.1994 under Ext.4. Thus, it implies that the WILL dated 16.05.1991 under Ext.10 has been revoked to gift such property again in favour of Defendant No.1. Therefore, the effect of the WILL under Ext.10 was ceased and no benefit there-from can flow in favour of Defendant No.1 to get any right over the estate of Pranaballav. The suit which was filed within three years from the date of alleged execution of the gift deed under Ext.4 is thus within the limitation prescribed thereof and further, the suit property is only confined to the properties mentioned in the alleged Gift Deed. The possession having not been transferred in respect of the properties in praesenti, the learned trial court has rightly declared the gift deed as void without conferring any right to Defendant No.1 to further convey the same by virtue of those sale deeds in favour of other Defendants.

11. As seen from the narration of facts in the pleadings of both parties, the first WILL dated 08.12.1976 under Ext.9 has become ineffective for two reasons, i.e. by virtue of the decree passed in Title Suit No.1 of 1985 wherein the question of adoption in favour of Defendant No.1 was negated which was an integral part in the WILL under Ext.9, and secondly, by virtue of execution of the second WILL

dated 16.05.1991 under Ext.10 granted in favour of Defendant No.1 in respect of the same properties earlier covered under Ext.9. Therefore, no quarrel is there in respect of existence of the last WILL dated 16.05.1991 under Ext.10 impliedly revoking the earlier WILL under Ext.9.

12. The WILL under Ext.10 is covering the landed property to the extent of Ac.11.78 decimals consisting of different plots under different khatas of mouza-Kalikaprasad in the district of Keonjhar. According to the findings of the learned trial court, Ext.10 being an un-probated WILL cannot be acted upon to pass the title validly in favour of Defendant No.1. But it is to be reminded here that Keonjhar includes its Sub-Division Champua, where the suit properties situate, is a Gadajat area and as has been held by this Court in several decisions is exempted from the provisions relating to probate of WILL. This Court in the case of Siba Sankar Sahoo vs. The State of Odisha & Others, 2022 (II) OLR—1030, have held as follows:-

"4. This Court finds, there has been settling of law so far as the Districts of Ganjam, Koraput, Phulbani, Athamalik, Mayurbhanj and Angul so also Patnagarh through different judgments. This Court further finds support of the Petitioner through the aforesaid decision taken note. It is at this stage, this Court also takes into account the Notification of the Government issued by the Revenue and Disaster Management bearing No.RDM-CHS-CLRFIC-0004-2018/6449/R & DM dated 7.5.2018, particularly Clause-6 therein, appearing at Annexure-5. Clause-6 reads as follows :

"6. In case of a Will which is not probated, the mutation shall be rejected. Even in case of a Will which is probated, mutation shall not be allowed in Scheduled Area, if the immovable property contained in the Will belongs to person belonging to Scheduled Tribe."

This Court also entering into the Administration of Orissa States Orders, 1948 finds, Order 4 therein reads as follows :

"4. Law to be applied-(a) The enactments specified in the first column of the Second Schedule hereto annexed shall, so far as circumstances admit and subject to any amendments to which the enactments are for the time being generally subject, in the territories to which may extend, apply to all Orissa states and any provision of any law in force, whether substantive or procedural and whether based on custom and usage or statutes, in any of the Orissa states which is repugnant to any provision of any of the said enactments shall to the extent of the repugnancy, cease to have effect from the date of commencement of this order."

This Court here again takes into account the definition of Orissa States under Order Sub-Order (3) of Order 2, which reads as follows :-

"(3) "Orissa states" means the states of Athgarh, Athamalik, Bamra, Baramba, Bonai, Boudh, Daspala, Dhenkanal, Gangpur, Hindol, Khandapara, Keonjhar,

Kalahandi, Nayagarh, Narasinghpur, Nilgiri, Pal-Lahara, Patna, Ranpur, Rairakhol, Sonapur, Talcher, Tigiria.”

There is clear mentioning of the entire Keonjhar District under the definition of Order Sub-Order (3) of Order 2 of the Administration of Orissa States Orders, 1948. It is needless to submit that the Notification even applies to districts involving merged States.

Besides above, there is also a number of decisions passed by this Court, as recorded herein above, dealing with different localities requiring no probate of the Will except the District of Keonjhar at hand.

5. Looking to the legal position of law on the aspect of requirement of probate involving ?WILL? particularly in the district of Koraput, this Court finds, in deciding such aspect, this High Court in the case of Sariamani Hota and ors. vrs. State of Orissa and Ors. : (2011) 112 CLT 756 in para-9 & 13 therein, has come to observe as follows:-

“9. Law is well settled that the registration of the Will is not necessary. The Apex Court in the case of Ishwardeo Narain Singh v. Smt. Kamta Devi and others MANU/SC/0125/1953 : AIR 1954 SC 280 at paragraph-4 has held that there is nothing in law which requires the registration of a Will and Wills are in a majority of cases not registered at all. To draw any inference against the genuineness of the Will on the ground of its non-registration appears to be wholly unwarranted.

13. This Court in the case of Sailabala Satpathy v. Parbati Satpathy and others 2008(I) OLR 729 has held that on reading of sections 57, 213(1), (2) and 264 of the Indian Succession Act together, it is clear that in order to derive right under a Will it is not required under law to probate the Will, if the Will is executed in a place outside the area specified in the clauses of section 57 of the said Act. The same view was also reiterated by this Court in the case of Balram Tripathy and another v. Lokanth Tripathy MANU/OR/0042/1973 : AIR 1973 Ori. 112. Therefore, probating the Will is not a condition of its admissibility.”

6. It is in the above legal backgrounds and for the clear protection of the Petitioner under the Administration of Orissa States Orders, 1948, referred to herein above, this Court finds, the Mutation Authority rejecting the mutation application asking the Petitioner to just get the Will probated and then approaching the Mutation Authority becomes wrong.

This Court in the circumstance interferes with the impugned order dated 4.6.2022 at Annexure-4 series in Mutation Case Nos.879, 880, 927 & 928 of 2022 and keeping in view the legal position already settled requiring no probate of the Will in the whole District of Keonjhar, directs the Tahasildar, Sadar, Keonjhar, O.P.3 to dispose of Mutation Case Nos. 879, 880, 927 & 928 of 2022 allowing thereby the said Cases in favour of the Petitioner for having no other legal embargo by completing the entire exercise within a period of one month from the date of communication of this judgment.”

13. Thus the finding of the learned trial court that, it lacks jurisdiction to adjudicate about validity and genuineness of the un-probated WILLS is a mis-conceived one and suffers from apparent error. A civil court while deciding the right, title of a party is not divested of the power to examine the validity of the WILL in order to adjudicate the right, title of the party when the subject in issue is concerning the same if the provisions of the probate of WILL as per the Indian Succession Act, 1925 are not attracted in the facts of the case.

14. A probate is nothing, but a legal enquiry by the competent court as to the validity of the WILL. As per the definition provided in Section 2(h) of the Indian Succession Act, 1925, WILL means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. It is true that, by executing the WILL, the author of the testament has casted duty with regard to the administration of his estate and the applicant for probate only seeks the permission of the court to perform their duty. There is no law which compels the applicant legally to file the proceeding for probate. In an application filed for grant of probate or letters of administration, no right is asserted or claimed by the applicant and the applicant only seeks recognition of the court to perform the duty vested upon him in the WILL. By the proceeding filed for grant of probate or letters of administration, no rights of the applicant are settled or secured in the legal sense. Thus, when the provision does not mandate probate of WILL in certain areas, the court cannot refuse to act upon the said WILL, which is exempted from the provisions of probate, for the mere reason that the same is un-probated.

15. So far as the Gift Deed under Ext.4 is concerned, undoubtedly the property covered by said gift is a part of property covered in the WILL under Ext.10. The suit schedule properties are all such properties mentioned in the gift deed except part of Plot No.1395 measuring area Ac.0.05 ½ decimals which is included in the WILL under Ext.10. The submission advanced on behalf of the Plaintiff that after the Gift Deed was executed on 23.02.1994 by the same testator of the WILL under Ext.10 in favour of the same legatee relating to such property included in the WILL nullifies the effect of the WILL and revoked it impliedly, is not found to be a convincing submission. Before construing an instrument either by prescription or revocation, the intention of the author is required to be seen mandatorily. It is all that the intention of the author depends for construction of the desire.

16. In Mathai Samuel and others vs. Eapen Eapen (dead) by LR's and others, (2012) 13 SCC 80, it is observed as follows:-

"12. Will is an instrument whereunder a person makes a disposition of his properties to take effect after his death and which is in its own nature ambulatory and revocable during his lifetime. It has three essentials:

- (1) It must be a legal declaration of the testator's intention;
- (2) That declaration must be with respect to his property; and

(3) The desire of the testator that the said declaration should be effectuated after his death.

13. The essential quality of a testamentary disposition is ambulatoriness of revocability during the executant's lifetime. Such a document is dependent upon the executant's death for its vigour and effect.

Xx .. xx .. xx ..

15. Gift/settlement is the transfer of existing property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee. Gift takes effect by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Section 122 of the Transfer of Property Act defines the "gift" as a voluntary transfer of property in consideration of the natural love and affection to a living person.

16. We may point out that in the case of a will, the crucial circumstance is the existence of a provision disposing of or distributing the property of the testator to take effect on his death. On the other hand, in case of a gift, the provision becomes operative immediately and a transfer in praesenti is intended and comes into effect. A will is, therefore, revocable because no interest is intended to pass during the lifetime of the owner of the property. In the case of gift, it comes into operation immediately. The nomenclature given by the parties to the transaction in question, as we have already indicated, is not decisive. A will need not be necessarily registered. The mere registration of "will" will not render the document a settlement. In other words, the real and the only reliable test for the purpose of finding out whether the document constitutes a will or a gift is to find out as to what exactly is the disposition which the document has made, whether it has transferred any interest in praesenti in favour of the settlees or it intended to transfer interest in favour of the settlees only on the death of the settlors.

Composite document

17. A composite document is severable and in part clearly testamentary, such part may take effect as a will and other part if it has the characteristics of a settlement and that part will take effect in that way. A document which operates to dispose of property in praesenti in respect of few items of the properties is a settlement and in future in respect of few other items after the deaths of the executants, it is a testamentary disposition. That one part of the document has effect during the lifetime of the executant i.e. the gift and the other part disposing the property after the death of the executant is a will. Reference may be made in this connection to the judgment of this Court in *M.S. Poullose v. Varghese* [1995 Supp (2) SCC 294].

18. In a composite document, which has the characteristics of a will as well as a gift, it may be necessary to have that document registered otherwise that part of the document which has the effect of a gift cannot be given effect to. Therefore,

it is not unusual to register a composite document which has the characteristics of a gift as well as a will. Consequently, the mere registration of document cannot have any determining effect in arriving at a conclusion that it is not a will. The document which may serve as evidence of the gift, falls within the sweep of Section 17 of the Registration Act. Where an instrument evidences creation, declaration, assignment, limitation or extinction of any present or future right, title or interest in immovable property or where any instrument acknowledges the receipt of payment of consideration on account of creation, declaration, assignment, limitation or extinction of such right, title or interest, in those cases alone the instrument or receipt would be compulsorily registerable under Section 17(1)(b) or (c) of the Registration Act, 1908. A "will" need not necessarily be registered. But the fact of registration of a "will" will not render the document a settlement. Exhibit A-1 was registered because of the composite character of the document.

Intention — Guiding factor

19. The primary rule of construction of a document is the intention of the executants, which must be found in the words used in the document. The question is not what may be supposed to have been intended, but what has been said. We need to carry on the exercise of construction or interpretation of the document only if the document is ambiguous, or its meaning is uncertain. If the language used in the document is unambiguous and the meaning is clear, evidently, that is what is meant by the executants of the document. Contemporary events and circumstances surrounding the execution of the document are not relevant in such situations.

20. Lord Hale in *R. v. Melling* [(1671) 1 Ventris 225 : 86 ER 151] (Vent at p. 231), in construing a testamentary disposition as well as a settlement, pointed out that the prime governing principle is the "law of instrument" i.e. the intention of the testator is "the law of the instrument". Lord Wilmot, C.J. in *Doe d Long v. Laming* [(1760) 2 Burr 1100 : 97 ER 731] (Burr at pp. 1111-12) described the intention of the testator as the "pole star" and is also described as the "nectar of the instrument". In *Stone, In re, Baker v. Stone* [(1895) 2 Ch 196 (CA)] [Ch at p. 200] the Master of the Rolls said as follows:

"... when I see an intention clearly expressed in a will, and find no rule of law opposed to giving effect to it, I disregard previous cases."

21. Coleridge, J. in *Shore v. Wilson* [(1842) 9 Cl & Fin 355 : 8 ER 450 (HL)] [Cl & Fin at pp. 525-26] held as follows: (ER pp. 517-18)

"The intention to be sought is the intention which is expressed in the instrument, not the intention which the maker of the instrument may have had in his mind. It is unquestionable that the object of all exposition of written instruments must be to ascertain the expressed meaning or intention of the writer; the expressed meaning being equivalent to the intention ... it is not allowable ... to adduce any evidence, however strong, to prove an unexpressed intention varying from that

which the words used import. This may be open no doubt to the remark, that, although we profess to be explaining the intention of the writer, we may be led in many cases to decide contrary to what can scarcely be doubted to have been the intention, rejecting evidence which may be more satisfactory in the particular instance to prove it. The answer is, that interpreters have to deal with the written expression of the writer's intention, and courts of law to carry into effect what he has written, not what it may be surmised, on however probable grounds, that he intended only to have written."

22. In Halsbury's Laws of England, 4th Edn., Vol. 50, p. 239, it is stated:

"408. Leading principle of construction.—The only principle of construction which is applicable without qualification to all wills and overrides every other rule of construction, is that the testator's intention is collected from a consideration of the whole will taken in connection with any evidence properly admissible, and the meaning of the will and of every part of it is determined according to that intention."

23. Underhill and Strahan in Interpretation of Wills and Settlements [Ed.: The Principles of the Interpretation of Wills and Settlements (1900 Edn.), by Arthur Underhill and James Andrew Strahan] (1900 Edn.), while construing a will held that:

"the intention to be sought is the intention which is expressed in the instrument not the intention which the maker of the instrument may have had in his mind. It is unquestionable that the object of all expositions of written instruments must be to ascertain the expressed meaning or intention of the writer; the expressed meaning being equivalent to the intention...."

24. Theobald on Wills (17th Edn., 2010) examined at length the characteristics of testamentary instruments. Chapter 15 of that book deals with the general principles of construction. Referring to Lindley, L.J. in *Musther, In re, Groves v. Musther* [(1890) 43 Ch D 569 (CA)] Ch D at p. 572, the author stated that the first rule of will construction is that every will is different and that prior cases are of little assistance. Referring to *Sammur v. Manzi* [(2009) 1 WLR 1834 (PC)] , the author notices that the Privy Council had approved the approach of considering wording of the will first without initial reference to authority, and commented that: (WLR p. 1838 E)

"6. ... Little assistance in construing a will is likely to be gained by consideration of how other Judges have interpreted similar wording in other cases."

Golden rule

25. We, therefore, have to examine the composite character of Exhibit A-1 document and interpret the same in accordance with the normal and natural meaning which is discernible from that document. In order to ascertain the intention of the testator, the point for consideration is not what the testator meant but what that which he has written means. It is often said that the

expressed intentions are assumed to be actual intentions. This Court in *A. Sreenivasa Pai v. Saraswathi Ammal* [(1985) 4 SCC 85] held that: (SCC p. 89, para 4)

"4. ... In construing a document, whether in English or in any Indian language, the fundamental rule to be adopted is to ascertain the intention adopted from the words employed in it."

Reference may also be made to the judgment of the Privy Council in *Rajendra Prasad Bose v. Gopal Prasad Sen* [(1929-30) 57 IA 296 : AIR 1930 PC 242] and *C. Cheriathan v. P. Narayanan Embranthiri* [(2009) 2 SCC 673 : (2009) 1 SCC (Civ) 692] .

17. In the case at hand, learned trial court has declared the Gift Deed under Ext.4 as void on the ground that the possession was not delivered to the Donee (Defendant No.1) nor did he acquired possession of the gifted property in question during the life time of the Donor. It has been stated by learned trial court that the essential ingredients of a gift regarding acceptance of the property during the life time of the donor (Pranaballav) has not been effected. Section 122 of the Transfer of Property Act, 1882 defines a gift, the same reads as follows:-

"122. "Gift" defined.—"Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee."

18. The principles of effecting a valid gift has been well-settled and the Hon^{ble} Supreme Court in *Daulat Singh v. State of Rajasthan*, (2021) 3 SCC 459, have explained as follows:-

22. A three-Judge Bench of this Court in *Naramadaben Maganlal Thakker v. Pranjivandas Maganlal Thakker* [*Naramadaben Maganlal Thakker v. Pranjivandas Maganlal Thakker*, (1997) 2 SCC 255] had held that : (SCC p. 258, paras 6-7)

"6. Acceptance by or on behalf of the donee must be made during the lifetime of the donor and while he is still capable of giving.

7. It would thus be clear that the execution of a registered gift deed, acceptance of the gift and delivery [Ed. : Delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property, as was clarified by a three-Judge Bench in *Renikuntla Rajamma v. K. Sarwanamma*, (2014) 9 SCC 445, which also held in para 19 that *Maganlal Thakker*, (1997) 2 SCC 255, "cannot be read to be an authority for the proposition that delivery of possession is an essential requirement for making a valid gift."In paras 16 and 18 of *Renikuntla Rajamma* case it was held:"16. ... Section 123 of the TP Act is in two parts. The first part deals with gifts of immovable property while the second part deals with gifts of movable property. Insofar as the gifts of immovable property are concerned, Section 123 makes transfer by a registered instrument mandatory. This is evident from the use of word "transfer must be effected" used

by Parliament insofar as immovable property is concerned. In contradiction to that requirement the second part of Section 123 dealing with gifts of movable property, simply requires that gift of movable property may be effected either by a registered instrument signed as aforesaid or "by delivery". The difference in the two provisions lies in the fact that insofar as the transfer of movable property by way of gift is concerned the same can be effected by a registered instrument or by delivery. Such transfer in the case of immovable property no doubt requires a registered instrument but the provision does not make delivery of possession of the immovable property gifted as an additional requirement for the gift to be valid and effective. If the intention of the legislature was to make delivery of possession of the property gifted also as a condition precedent for a valid gift, the provision could and indeed would have specifically said so. Absence of any such requirement can only lead us to the conclusion that delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property.**18. We are in respectful agreement with the statement of law contained in the above passage in K. Balakrishnan, (2004) 1 SCC 581. There is indeed no provision in law that ownership in property cannot be gifted without transfer of possession of such property. As noticed earlier, Section 123 does not make the delivery of possession of the gifted property essential for validity of a gift...."] of the property, together make the gift complete. Thereafter, the donor is divested of his title and the donee becomes the absolute owner of the property."

Xx .. xx .. xx ..

24. At the outset, it ought to be noted that Section 122 of the Transfer of Property Act, 1882 neither defines acceptance, nor does it prescribe any particular mode for accepting the gift. The word "acceptance" is defined as "is the receipt of a thing offered by another with an intention to retain it, as acceptance of a gift". (See Ramanatha P. Aiyar : The Law Lexicon, 2nd Edn., p. 19.)

25. The aforesaid fact can be ascertained from the surrounding circumstances such as taking into possession the property by the donee or by being in the possession of the gift deed itself. The only requirement stipulated here is that, the acceptance of the gift must be effectuated within the lifetime of the donor itself.

26. Hence, being an act of receiving willingly, acceptance can be inferred by the implied conduct of the donee. The aforesaid position has been reiterated by this Court in Asokan v. Lakshmikutty [Asokan v. Lakshmikutty, (2007) 13 SCC 210] : (SCC pp. 215-16, para 14)

"14. Gifts do not contemplate payment of any consideration or compensation. It is, however, beyond any doubt or dispute that in order to constitute a valid gift acceptance thereof is essential. We must, however, notice that the Transfer of Property Act does not prescribe any particular mode of acceptance. It is the

circumstances attending to the transaction which may be relevant for determining the question. There may be various means to prove acceptance of a gift. The document may be handed over to a donee, which in a given situation may also amount to a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance.”

19. In the given facts of the case, it is true that the original Gift Deed has not been produced before the court by the donee, but the certified copy of the same under Ext.4 has been produced and the book volume from the Office of the Sub-Registrar, Champua in that regard was called for and marked Ext.J-1 and K-1 on behalf of Defendant No.1 (the donee). It is of course true that despite absence of production of the original gift deed, the existence and execution of the same is admitted by the Plaintiff, where she has prayed to declare said gift deed dated 23.02.1994 as invalid and void. It is the settled law that whoever seeks to declare a document void, the initial burden is upon him to prove that the document is void as such. Such principle with regard to burden of proof has been enshrined in Section 101 to Section 110 of the Indian Evidence Act (Sections 104 to 114 Of BSA).

20. It is well-settled that putting onus on the wrong party would vitiate the entire finding of the judgment. Here learned trial court has arrived at the conclusion to declare Ext.4 as void observing that, non-production of the original deed, the absence of proof of the execution of the gift without examining any of the attesting witnesses even by way of secondary evidence coupled with the statement of Defendant No.1 during his cross-examination regarding taking over possession of the gifted property renders the gift as inoperative and void in respect of Defendant No.1 (the donee).

21. As stated above, the initial burden is with the Plaintiff to satisfy that the gift is inoperative and void. It is true that the Defendant No.1 was unable to produce the original gift deed and pleaded the same has been lost somewhere in Tahasil Office during subsequent transactions relating to the property. This statement of the Defendant No.1 is not countered in the sense that the Plaintiff admits about execution of the Gift Deed by her father in favour of Defendant No.1. According to the Plaintiff, the WILL as well as the Gift Deed has been managed to be executed by her father at the instance of Defendant No.1 taking advantage of illness and unsoundness of mind of the donor (Pranaballav) during his last death. It is seen that, the stamp papers to execute the Gift Deed were purchased by the donor himself, and not by any other person on his behalf. Ext.4 is a registered document. So a prima facie presumption is there to the effect that Ext.4 has been validly executed by Pranaballav subject to rebuttal circumstances to be adduced by the Plaintiff to disbelieve valid execution of the gift. It is seen that here the learned trial court has shifted the burden on Defendant No.1 to prove valid execution of the gift and valid transfer of the properties concerned. It is true that the Defendant No.1 did not examine the attesting witnesses or attestation of the execution of the gift deed by producing any secondary

evidence. The donor as well as both the attesting witnesses were dead and so could not be produced as witnesses. Learned trial court has observed that the scribe of the gift deed, namely, Radhashyam Mahanta is though alive, but no step has been taken by Defendant No.1 to examine him as a witness in order to prove the signature of the donor and attesting witnesses as a matter of secondary evidence. Thereby the learned trial court throws complete burden on Defendant No.1 to prove the Gift Deed under Ext.4 as a valid one. It is to be remembered here that Defendant No.1 has not come to the court to declare his right, title over the properties concerned depending on the Gift Deed, but it is the adverse party, who came as the Plaintiff to declare the Gift Deed as void. As per the averments made in the plaint, the Plaintiff's assertion is to the effect that Defendant No.1 taking advantage of mental imbalance and illness of her father (Pranaballav) has managed to get such gift in his favour through execution of the Gift Deed as per Ext.4. Thus, in other words, the Plaintiff while admitting the execution of the Gift Deed by her father in favour of Defendant No.1, contends that such Gift Deed executed in favour of Defendant No.1 is by way of fraud or manipulation or by illegally influencing her father (the donor). Therefore, the onus comes heavily upon the Plaintiff to prove her contention. But the learned trial court without getting into the same and examining the truthfulness of the assertion of the Plaintiff misplaced the burden on Defendant No.1 to prove valid execution of the gift deed as per Ext.4. Section 16 of the Contract Act provides that, a contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. The Privy Council in *Raghunath Prasad v. Sarju Prasad*, AIR 1924 PC 60, have expounded three stages for consideration of a case of undue influence. It was pointed out that the first thing to be considered is, whether the plaintiff or the party seeking relief on the ground of undue influence has proved that the relations between the parties to each other are such that one is in a position to dominate the will of the other. Up to this point, 'influence' alone has been made out. Once that position is substantiated, the second stage has been reached namely, the issue whether the transaction has been induced by undue influence. That is to say, it is not sufficient for the person seeking the relief to show that the relations of the parties have been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Upon a determination of the issue at the second stage, a third point emerges, which is of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that it was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

22. As stated above, the prima facie burden on the Plaintiff will not shift to Defendant No.1 unless she discharges the burden as per her contentions in the plaint that Pranaballav was in ailment, with an imbalanced mind and was influenced by Defendant No.1. The Plaintiff's evidence in this regard is silent and

unsupported with substance. Learned trial court appears to have swayed with the impression that the Plaintiff is the natural successor of Pranaballav and she has been deprived of her succession rights over the properties of Pranaballav as the WILL and Gift Deed conveys the right diverting from natural line of succession. Here the background facts of the parties as narrated in their pleadings are important to be taken note of. The Plaintiff had eloped to marry such a person against the wish of her father and fled away from their house leaving Pranaballav alone to lead her life with her husband and children separately. She did not return to her parental house for around 15 years to see the condition of her father (Pranaballav) that how he was struggling with life at his old age. During such crucial period, it is Defendant No.1, who came to Pranaballav, his maternal uncle, to stay with him and has taken care of him. This is not what is stated only by Defendant No.1, but also has been mentioned in the recitals of Ext.10 and Ext.4. When the existence and execution of an instrument is not disputed production of the original instrument becomes immaterial. At the same time, it is not disputed that production of a document does not admits the contents thereof as true, for which necessary evidence relevant to the subject must be adduced. Therefore, when the certified copy of the gift deed and the book volume thereof maintained in the Office of the Sub-Registrar has been successfully produced, the onus comes on the Plaintiff to disprove the contents thereof in order to have a case in her favour. As seen from the record, the Plaintiff examined four witnesses on her behalf. It is stated by her during her examination that Pranaballav was cunningly taken to Champua to register the Gift Deed dated 23.02.1994 in favour of Defendant No.1 and at that time Pranaballav was unable to move and unable to understand anything as he lost the balance of his mind. But the admitted fact remains that Pranaballav purchased the stamp papers for execution of the gift deed and remained present before the Sub-Registrar to register the Gift Deed and thus, the contention of the Plaintiff that Pranaballav was unable to move, unable to understand anything and lost his balance of mind are found incorrect and unsubstantiated. Pranaballav was a retired Government servant and read upto matriculation and as per the admission of the Plaintiff (as P.W.1) he was able to read and write Odia as well as English. Pranaballav retired as an Agriculture Overseer. The Plaintiff does not dispute the recitals of the Gift Deed and the WILL with regard to her neglect towards Pranaballav. The medical certificate granted by P.W.4, the alleged treating Doctor of Pranaballav as per Ext.8 is not seen to be proved as a reliable document in view of the statements of evidence made by P.W.4 in his deposition. Said P.W.4 though has said treating Pranaballav being brought by the Plaintiff, but does neither produce the admission register or other connected papers nor do produce any material to satisfy the fact about any psychosis problem of Pranaballav. The very presence of Pranaballav before the Sub-Registrar and his undisputed signature furnished on the Gift Deed (Ext.4) does not warrant any mental disorder suffered by him at the time of execution of the instrument. A thorough examination of all such statements made by the Plaintiff and other witnesses does not make out the case in favour of the Plaintiff to disbelieve valid execution of the Gift Deed in favour of

Defendant No.1. In the circumstances, the plaintiff has failed to prove her contentions, prima facie, to shift the onus to Defendant No.1 requiring him to prove valid execution of the Gift Deed under Ext.4.

23. So far as the handing over possession of the gifted property in favour of Defendant No.1 is concerned, as per the recitals of the Gift Deed, the same was handed over to Defendant No.1 on the same day. It is also stated by Defendant No.1 that he took possession of the property on the same day of execution of the Gift Deed. But the learned trial court disbelieved taking over possession of the gifted properties by Defendant No.1 finding discrepancy in the statement of D.W.4. A true evidence is bound to contain minor discrepancies, and in this regard the statement of D.W.4 that Defendant No.1 took possession of the properties in one morning seems to be a minor discrepancy and the emphasis given by learned trial court on the same to discard the possession of Defendant No.1 over the properties pursuant to execution of Ext.4 is thus found unwarranted. The learned trial court seems to have closed his eyes from another relevant aspect that the register sale deeds executed in favour of Defendants 2 to 6 are of the year of 1996, i.e. before death of Pranaballav. Pranaballav died on 25.01.1997. So the admitted fact remains that the sale deeds under Ext.D-2, E-2 & F-2 were executed much prior to his death and the learned trial court has recognized possession of such purchasers (Defendants 2 to 6) by virtue of those three sale deeds over the properties covered in the Gift Deed. The same is seen clearly from the decree that Defendants 2 to 6 are directed to deliver possession of the suit properties to the Plaintiff. This means Defendants 2 to 6 were put in possession over the property they purchased from Defendant No.1 and this establishes the fact that Defendant No.1 was in possession of those properties so that he delivered the possession to Defendants 2 to 6. When it is the case of the Plaintiff that Defendants 2 to 6 are in possession of such portion of the suit land by virtue of the registered sale deeds executed in their favour, the same otherwise implies the possession of Defendant No.1 over such properties prior to the same were given to the possession of Defendants 2 to 6. That apart, when the donor was alive till a substantial period from the date of execution of the gift deed and in the meantime the donee has sold out part of gifted property in favour of third parties, it would be very unfair to say that Defendant No.1 was not delivered with possession of the gifted property as per the Gift Deed under Ext.4. Learned trial court has missed this relevant aspect of the fact to conclude his decision against the Defendants under Issue No.12. Thus, such findings arrived by the learned trial court under Issue No.12 is liable to be set aside.

24. Of course, the finding in Issue No.13 is dependent on the finding under Issue No.12 and the learned trial court has set aside the sale deeds declaring the same as void and inoperative based on its finding given in favour of the Plaintiff to declare the Gift Deed under Ext.4 as invalid and void.

25. In view of the discussions made in preceding paragraphs, the findings of the learned trial court under Issue No.12 are set aside and it is held that the Plaintiff

has failed to prove the Gift Deed dated 23.02.1994 as per Ext.4 as invalid or void. This issue is accordingly answered against the Plaintiff and consequently Issue No.13 is also answered against the Plaintiff. The findings of the learned trial court under Issue No.13 are consequently set aside.

26. One more aspect relating to limitation is raised by the Appellants with regard to sustainability and maintainability of the challenge of Plaintiff to the WILL dated 16.05.1991 under Ext.10. It is contended by the Appellants that, the challenge to said WILL dated 16.05.1991 is barred by law of limitation to the present suit which was filed in the year 1997. The suit has been filed beyond the limitation period of three years and thus the prayer in that respect is barred by limitation which has been ignored by the learned trial court.

27. As seen from the findings and discussions made under Issue No.12, the learned trial court has restricted him with observation that the WILL being an inoperative one, the court lacks jurisdiction to adjudicate about validity and genuineness of the un-probated WILLS. As observed in the previous paragraphs that a WILL in respect of the property situating in Keonjhar district is not required to be probated, the contention of the Appellants with regard to limitation to challenge the execution of the WILL is not felt appropriate to be answered here. In absence of probate proceeding, the question is left open to be decided by the competent court at appropriate time.

28. In view of the discussions made and reasons stated above, the appeal is allowed and the impugned judgment and decree is set aside. It is ordered that,

ORDER

"The appeal is allowed. The impugned judgment and decree is set aside and the suit is dismissed. Parties are directed to bear their own costs. The modified decree be drawn accordingly."